

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
REX DUNCAN, ERIK OLSEN,)
and SAM HOFMAN)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Karl Hossner, a candidate for the Gallatin County Commission in the 1994 election, filed a complaint against Rex Duncan, Erik Olsen, and Sam Hofman, alleging that they violated Mont. Code Ann. § 13-35-234 by making false statements concerning his candidacy in ads placed in newspapers.

SUMMARY OF FACTS

Complaint Against Rex Duncan and Erik Olsen

1. Hossner was an unsuccessful candidate for the Gallatin County Commission during the 1994 election. His opponent was Phil Olson (no relation to Erik Olsen).

2. Hossner alleges that two ads placed in a newspaper by Duncan and Olsen contain false statements in violation of Mont. Code Ann. § 13-35-234.

3. Hossner complains about a statement contained in an ad placed in the November 2, 1994 issue of the Bozeman Daily Chronicle. The underscored portion is the specific language that Hossner complains about, but additional language is quoted to place the disputed statement in context:

SEPTEMBER, 1993 . . . Karl Hossner lived in the City of Bozeman, District No. 1, while seeking a seat vacated by Deb Berglund.

MARCH, 1994 . . . Karl filed as a Democrat in District No. 3, stating his address to be Enders Road in Gallatin Gateway.

Does Karl really live on Enders Road?

How many people would live in an unskirted trailer in the middle of an alfalfa field without water, sewer or phone? Karl stated in a Chronicle interview that his wife, who maintains their Bozeman residence, would "sometimes visit" him on the weekends. Does that make Enders Road or Bozeman his primary family residence? [Emphasis added.]

4. An ad containing nearly identical language was placed by Duncan and Olsen in the November 6, 1994 issue of the Bozeman Daily Chronicle. However, the statement underlined in the above quote was revised by deletion of the word "phone":

How many people would live in an unskirted trailer in the middle of an alfalfa field without water or sewer?

5. Hossner contends these statements imply that he was only a temporary resident in the district for which he was a candidate, and therefore reflect on his honesty.

6. Pursuant to Montana law, Gallatin County is divided into three districts for purposes of election of county commissioners. Mont. Code Ann. § 7-4-2102. Hossner contends that his residence at the time the ads were published was a mobile home located in an alfalfa field on Enders Road, in Gallatin Gateway (located in District No. 3). He states that the mobile home was moved onto the site in March, 1994, and that water and sewer were installed prior to that date. Temporary power was run from a nearby barn to the mobile home pending a permanent power hookup by Montana Power, which did not occur until September, 1994. The alfalfa field is part of a 400 acre farm belonging to Hossner's wife's family. The

business name for the farm is "Kessler Farms, Inc." Hossner stated that he moved the mobile home to the farm, which he manages, specifically to file for the position of Gallatin County Commissioner for District No. 3.

7. The ads were prepared by Duncan and Olsen, and were not approved by or prepared in behalf of Phil Olson or the Republican party. Duncan and Olsen each gathered information for the content of the ads. Olsen spoke with Gallatin County Attorney Mike Salvagni concerning the legal requirements for a person's "residence". Duncan and Olsen stated that they both drove by the mobile home on numerous occasions, and it did not appear that anyone was living there. The trailer was unskirted, and did not appear to them to have power, water, or sewer hookups. In addition, Olsen stated he called information on numerous occasions beginning in June, 1994, and there was no telephone listing for Hossner until November 4, 1994.

8. Duncan stated that in October, 1994 he personally checked the records at the Gallatin City-County Health Department to determine whether a septic system was installed for the mobile home. He was advised at that time that while a permit had been issued no approved septic system served the site. During the investigation of this complaint Duncan produced a letter from Thomas Moore of the Gallatin City-County Health Department. The letter, dated April 7, 1995, states in relevant part as follows:

Mr. Rex Duncan approached our department in October of 1994 to determine whether an approved septic system was installed for the mobile home site listed as the

residence of Karl Hossner, then candidate for county commission.

The information Mr. Duncan took away was that while a permit had been issued no currently approved septic system served the site.

Our records indicate there are two approved septic systems on land owned by Kessler Farms, Inc. The first serves a house and was inspected and approved 9-13-89. Its address is listed as 11430 Enders Road. The second serves a mobile home site and was inspected and approved 3-14-94, seven months before Mr. Duncan came seeking information.

It cannot be ascertained how the incorrect information was obtained. The Health Department may have mistakenly pulled the wrong permit, or perhaps the name was incorrectly spelled by either an employee or Mr. Duncan when it was searched in the computer. Many other possible explanations can be formulated.

It is certainly possible the Gallatin City-County Health Department was at fault in this matter. It is also possible we were not. [Emphasis in original.]

9. In the fall of 1993, Hossner lived in Gallatin County Commission District No. 1, at 3023 Erwin, in Bozeman. In March, 1994, Hossner claimed he resided in District No. 3. On his declaration for nomination as a candidate for county commissioner, Hossner listed his address as "11400 Enders Rd., Bozeman, MT 59715." [Emphasis added]. He listed his telephone number as "586-7455." The address for Enders Road is Gallatin Gateway, not Bozeman. Gallatin Gateway has a zip code of 59730, while Bozeman's general zip code is 59715. The telephone prefix for Gallatin Gateway is 763, while 586 is a prefix for Bozeman. The 586-7455 telephone number is for Hossner's Bozeman residence, not the Gallatin Gateway residence.

10. In March, 1994, Hossner completed an application for a wastewater treatment system permit for the mobile home at 11400 Enders Road in Gallatin Gateway. On this application he also listed his address as 3023 Erwin, in Bozeman. He listed his telephone number as 586-7455.

11. Hossner registered a GMC pickup truck in Idaho on May 31, 1994, listing an address of 109 N. 2nd West, St. Anthony, Idaho. He registered a horse trailer in Idaho on May 9, 1990, again listing a post office address in St. Anthony, Idaho. Hossner was issued an Idaho driver's license on December 3, 1991, listing the same Idaho address listed for the GMC pickup truck.

12. Duncan and Olsen contend that they had no intention of misrepresenting facts or making false statements. They contend that under the circumstances there were legitimate questions regarding Hossner's actual residence, and they feel they were justified in voicing their concerns through the published ads. Duncan and Olsen stated they deleted the "phone" reference from the original ad when they discovered, on November 4, 1994, that a telephone number with a "763" prefix was in operation at the mobile home.

Complaint Against Sam Hofman

13. Hossner alleges that an ad placed in a newspaper by Hofman contains false statements in violation of Mont. Code Ann. § 13-35-234.

14. Hofman wrote a letter to the editor that was published in the Belgrade newspaper. He attempted to get the same letter

published in the Bozeman Daily Chronicle, but was told there was no more room for letters. He therefore paid to have it placed as an ad in the Chronicle. Hossner complains about what he characterizes as "implications" in the ad which question his honesty. The ad states, in pertinent part, as follows:

An Open Letter to the Public on:

Why I question the integrity of Karl Hossner . . .

by Sam Hofman

Mr. Karl Hossner is the Democratic candidate for County Commissioner. He is not worthy of the position and, by his own action, he seems to be, basically, a dishonest person. He does not appear to be trustworthy to run the government of the Gallatin County [sic] with a budget of \$22 million.

He does not live in the commission district he is trying to represent, which is a requirement of the law.

He moved a trailer to the east side of Enders Road and placed it in a hay field. He applied for a sewer permit in early March. There is no visible sign of ground disturbance to show that the septic tank and drain field have been put in. There is also no evidence that water has been made available to the trailer. The electrical power to the trailer was hooked up just last September 6th.

On August 20th, the day of the Manhattan Potato Festival, Mr. Hossner was driving a pick up truck [sic] pulling a horse trailer, both with Idaho plates. Both units were registered in his name in the State of Idaho.

15. Hofman states that this was intended to be a letter to the editor, reflecting his personal opinion regarding the candidacy of Hossner. He based his opinion on his observation of Hossner campaigning in a pickup and horse trailer bearing Idaho plates; his knowledge that Hossner had previously vied for a seat on the commission in District No. 1, in Bozeman; his knowledge that

Hossner maintained a residence in Bozeman; and his observation that the mobile home in Gallatin Gateway was unskirted, did not appear to have power, had no noticeable evidence of ground disturbance indicating water and sewer hookups, and it did not appear that Hossner was actually living there. Hofman concluded that Hossner had moved the trailer to the Gallatin Gateway location simply to comply with the residence requirements for his candidacy in District No. 3. Hofman states that he did not intend to misrepresent anything in the letter. He was simply stating his opinion based on his knowledge and observations.

16. Hofman paid for the ad with his own money. The ad was not authorized by or prepared in behalf of Phil Olson or the Republican Party.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234 provides:

Political criminal libel - misrepresenting voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

This is a criminal statute. A violation can be established only if the evidence supports findings that 1) there was a misrepresentation or false statement, 2) made "with knowledge of its falsity or with a reckless disregard as to whether it is true

or not ". Mont. Code Ann. § 13-35-101 states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Mont. Code Ann. § 45-2-101(33) defines "knowingly":

. . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

Applying this definition, to establish a violation in this case it would be necessary to prove that Duncan, Olsen, and Hofman were "aware of a high probability" that the statements contained in their ads were false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The Compiler's Comments to Mont. Code Ann. § 13-35-234 note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)". That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice"; that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications". The Court noted that such "subjective awareness of probable falsity" may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57.

Other cases have held that "reckless disregard" is "more than mere negligence", Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986); and that "a failure to investigate is not sufficient in itself to establish reckless disregard", Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [Citation omitted]. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement.* [Italics in original].

Applying these principles to the facts in this case, the evidence does not support a finding that Mont. Code Ann. § 13-35-234 was violated by Duncan and Olsen. The primary dispute concerns the statement: "How many people would live in an unskirted trailer in the middle of an alfalfa field without water, sewer or phone?" Defamation may be committed by the making of a statement that merely asks a question. Henderson v. Pennwalt Corp., 704 P.2d 1256, 1263-64 (Wash. Ct. App. 1985). Duncan and Olsen based the

statement on knowledge gained from their own observations and investigation concerning the mobile home. In October, 1994, Duncan was advised by employees of the Gallatin City-County Health Department that no septic system served the site of the mobile home. That information later proved to be inaccurate, but Duncan was entitled to rely on it at the time of his inquiry.

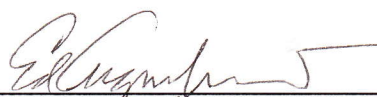
There is no evidence that either Duncan or Olsen "subjectively entertained serious doubts" concerning the truth of the statements in their ad. While further investigation may have been warranted, a failure to investigate is not sufficient to establish reckless disregard. Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). Under the circumstances, there is insufficient evidence to establish that Duncan and Olsen violated Mont. Code Ann. § 13-35-234.

The evidence also does not support a finding that Mont. Code Ann. § 13-35-234 was violated by Hofman. Allegedly defamatory words must be construed in their entirety and with reference to the entire document in which they appear. Tindall v. Konitz Contracting, Inc., 240 Mont. 345, 355, 783 P.2d 1376, 1382 (1989). Viewed in the context of the entire letter, the statements contained therein are clearly intended to represent Hofman's personal opinion on the issue of Hossner's candidacy. A basic tenet of the law of civil defamation is that an expression of opinion is generally not actionable. Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 121, 760 P.2d 57, 62 (1988). Moreover, as in the case of the ads placed by Duncan and Olsen, there is no

evidence that Hofman "subjectively entertained serious doubts" concerning the truth of the statements in his letter. Nor is there evidence that Hofman was "aware of a high probability" that any of the statements contained in the letter were false.

Based on the preceding, there is insufficient evidence to conclude that Duncan, Olsen, and Hofman violated Mont. Code Ann. § 13-35-234.

DATED this 19th day of April, 1995.



Ed Argenbright, Ed. D.
Commissioner of Political Practices